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Laborde's Religion

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In *Liberalism's Religion*, Cécile Laborde aims 'to provide reasoned solutions' to political controversies over religion (Laborde 2017, p. 4). At the same time, she aims to provide a diagnosis of the way liberal political philosophy has understood and treated religion. She mainly aims to do the former by way of doing the latter. Her proposed solutions to particular political controversies over religion are accordingly specifically *liberal* solutions. The principles she propose as providing these solutions are furthermore articulated by way of an examination of how liberal political philosophers have recently struggled with religion.

This is both a much needed and a sensible approach. Liberals are more torn about religion than proponents of many other political views, e.g. conservatives and socialists. There has furthermore long been a tendency for insufficiently worked out liberal ideas, such as notions about neutrality, separation, and rights, to spill over in to public political debates about religion in ways that have often not contributed to real 'solutions' but have rather tended to exacerbate existing conflicts.

This means that Laborde's solutions are actually more about liberalism than about religion, more about what should *matter* to liberalism than what religion *is* in some deeper sense. This is not a problem but arguably a strength of Laborde's approach – as long as one keeps it in mind.

So one can ask two kinds of questions to Laborde's book. One concerns her diagnosis of how liberalism should understand and handle religion. Is her disaggregation approach on the right track? Is her interpretation of the liberal philosophers of religion on which she bases her own theory reasonable? Does she succeed in identifying the right dimensions of religion that should actually matter from a liberal perspective, or are some missing?

The other kind of question one might ask concerns the solutions to political controversies over religion that Laborde proposes on this basis. The relevant question here is not whether she interprets Dworkin, Quong, or Eisgruber and Sager correctly or whether she manages to provide an exhaustive picture of what a liberal theory of religion should include. The question then rather concerns whether the principles she proposes for handling specific kinds of controversies can actually do the job. Can they be applied in a way yielding the promised solutions? And are the policy prescriptions that follow from them plausible?

In my comments, I will ask the latter kind of question. My discussion will – as it were – concern the output side of Laborde's book rather than the input side, i.e. the second part of the book rather than the first part. This is not because I find the input side less relevant – in fact, I very much agree with Laborde's overall disaggregation approach. I have very little to

quarrel with here. But what makes an extensive discussion of ‘Liberalism’s religion’ worthwhile and important is not exegetical discussions of how to understand specific philosophers, but rather that religious controversies are very salient in contemporary politics and an important motivation for liberal political philosophy. So let us concentrate on whether Laborde’s take on liberalism’s religion can actually help us in providing reasoned solutions to controversies that motivate us in the first place.

In order to consider this, I will pick out a few of the central outputs of Laborde’s theory. I will mainly ask whether the proposed principles can do the job of providing solutions. I ask this, not in the hope of revealing reasons for rejecting Laborde’s theory, since I agree with the overall approach. I rather ask this in order to focus on her practical contribution and where it might need to be further developed.

The accessibility condition

The first respect in which religion can be problematic from the point of view of liberalism that Laborde identifies concerns an *epistemic* wrong:

when the state appeals to the authority of a particular God, non-adherents are coerced in the name of reasons that they do not understand and cannot engage with: they are not respected as *democratic reasoners*. (p. 112)

This is the well-known topic of debates about public reason, namely religion used in the *justification* of state policies. Laborde proposes that it is a necessary, not a sufficient, condition for the liberal legitimacy of policies that reasons are accessible:

The basic thought is that state-proffered *reasons* for laws must be articulated in a language that members of the public can understand and engage with. There are epistemic constraints on the *inputs* into public debate – what I call constraints of public reason *stricto sensu*. Official justification by the state should not appeal to reasons that actual citizens find inaccessible: that they cannot understand and discuss as reasons. (p. 113)

On this basis, Laborde articulates what she labels ‘Principle 1 of minimal liberal secularism’:

when a reason is not generally accessible, it should not be appealed to by state officials to justify state coercion. (pp. 113-114)

Laborde distinguishes the accessibility condition from two competing positions in debates about public reason. One is the inclusivist position championed by convergence theorists such as Gerald Gaus and Kevin Vallier, who advocate an *intelligibility condition* according to which reasons for laws should merely be understandable in relation to the specific doctrine or epistemic standards of the speaker. For inclusivists, a law can be in accordance with public reason if other citizens can understand how there are reasons for it relative to the beliefs of the legislator, whether or not citizens themselves share or are even in a position to evaluate these beliefs. Laborde finds that this is a too weak condition, since it does not

respect citizens who are coerced by laws as democratic reasoners: they cannot engage with reasons if they are not accessible.

On the other hand, Laborde distinguishes her view from exclusivist positions based on a more exacting *shareability condition* according to which reasons for laws have to be endorsed according to common standards. She notes that exclusivist views both tend to assume a too strong anti-perfectionism and that the public reason requirement has to do all the work of ensuring liberal legitimacy. Since she rejects both assumptions, accessibility seems enough as far as the public reason requirement goes – since citizens who are coerced by laws can understand and assess the reasons proposed for laws even if they cannot endorse them according to common standards.

The difference between the three positions seems to follow from the combination of two independent distinctions, which Laborde presents in the following diagram (p. 113):

| | Agent's own standards | Common standards |
|---------------|-----------------------|------------------|
| Understanding | Intelligibility | Accessibility |
| Endorsement | X | Shareability |

So Laborde's position is based on two claims, namely

- 1) that *the relevant standard* against which to assess reasons proposed in justification of coercive laws are common standards, i.e. that laws are not liberally legitimate if they are only justified with reference to the standards of the agent proposing the law, and
- 2) that a law can be liberally legitimate even if citizens coerced by it cannot endorse the reasons for it, as long as they can understand and assess the reasons.

I agree with Laborde's defences against inclusivist/convergence positions based on an intelligibility condition and exclusivist positions based on a shareability condition. So my critical comment regarding the accessibility condition is not based on a normative preference for one of the competing positions. Rather, my remarks concern whether the accessibility condition is formulated in a way suited to do the job it is supposed to do.

My first question concerns the difference between endorsement and understanding required for the distinction between the accessibility condition and the shareability condition to hold up. We have to consider this in connection with the understanding of the other distinction between the 'agent's own standards' and 'common standards', since endorsement and understanding both have to be understood relative to the latter.

The reference to 'standards' is not very precise. It is not clear what counts as a 'standard' at all. One plausible way to understand this is in light of Jonathan Quong's definition of foundational disagreement, which Laborde discusses earlier. Disagreement is foundational when it goes 'all the way down' in the sense that we 'share no premise from which to disagree, no justificatory framework that would allow us to weigh the merits and flaws of

one another's views' (p. 91). If we read the distinction between agent's own standards and shared standards in light of this idea, then the former denotes foundational disagreement, because parties have no shared premise, whereas the latter means that there is not foundational disagreement, but that parties share some premise.

If we proceed from this understanding of the first distinction, however, then the question is how we should understand the difference between accessibility and shareability. Both are consensus positions in the sense that they require common standards. But if this in turn means that people have to have shared premises, it becomes hard to see how the distinction between accessibility and shareability can be sustained; if people share premises, isn't understanding a reason in relation to these shared premises tantamount to endorsing the reason? If I understand a reason in relation to a premise that I share, how can I not also endorse the reason? This threatens to collapse the room for epistemic positions between foundational disagreement (convergence positions) and actual substantive agreement (consensus positions).

How can we understand the accessibility/shareability distinction so that it does not collapse in this way? One possibility is to say that it turns on the argument *from* the shared premise *to* a given law. This would be a specification of what we should understand by 'reason' in public reason views, which is often not explained very well. In many such debates, 'reason' merely denotes any consideration that counts in favour of a law. However, neither empirical claims nor normative principles support laws when taken in isolation. The claims that 'tax law X will generate revenue Y' or 'tax law X conforms to distributional principle Z' do not count in favour of law X unless we also have an independent commitment to principle Z or to raising revenue Y for other reasons. We need to distinguish between 'reason' in the sense of a particular (empirical or normative) claim and 'reason' in the sense of an argument linking a number of claims to a law. In the first sense, 'reason' denotes a claim functioning as a premise in an argument, in the latter sense, 'reason' denotes the argument as a whole.

On this understanding, shareability requires that parties endorse the entire argument from their shared premises to the law in question (in which case we can talk of shared justification). Public reason then requires *both* that people have common standards in the sense that they share premises *and* that they agree that these premises provide *pro tanto* justification for a given law. Accessibility, on the other hand, merely requires shared premises but allows that people disagree about the argument from the premises to the law in question (in which case we can talk about accessible justification). This would allow for the apparently common phenomenon that people can agree on the relevant normative premises (e.g., policy aims) and still disagree about whether a law is justified (i.e., policy means), e.g. if they at the same time have different assessments about the empirical consequences of adopting the policy.

This way of understanding the distinction would preserve the difference between accessibility and shareability.

The next question is whether we can apply the accessibility condition in a way allowing us to separate accessible from inaccessible justifications, which is what is required for it to

actually provide a solution to the problems of concern to public reason debates. In other words, how do we determine whether a given justification actually is accessible?

Laborde does not directly say anything about this other than the already noted formulations about citizens being able to *understand* and *assess* reasons for laws according to common standards. Her main concern is to show that the accessibility condition is not unfairly biased against religion, since it does not amount to picking out religious reasons as especially problematic. She rather stresses that accessibility is not the same as secularity. Reasons based on private personal experience can be just as inaccessible as religious revelations. On the other hand (contra positions such as that of Robert Audi), reasons can be accessible even if they are religious. Religious reasons need not depend on inaccessible premises. In those cases, religious reasons are not excluded by her preferred public reason requirement.

But how do we know? Laborde remarks that her view is an ‘empirical theory of public reason’ (p. 123). This first of all means that we cannot know beforehand whether religious reasons are accessible or not; this is a *contingent* question the answer to which depends on specific facts about the particular case. The theory therefore requires us to evaluate reasons case-by-case. While this provides Laborde with a plausible rejoinder to the inclusivist charge that public reason requirements unfairly single out religious reasons for exclusion, it simultaneously places a burden on her theory. We cannot *do* what the theory requires unless we have a *criterion* of accessibility against which we can conduct the case-by-case assessment of reasons.

This might place Laborde in a dilemma. She writes that ‘public reasons are reasons that actual (not idealized) publics find accessible’ (p. 114). This suggests that the required criterion is also empirical in the additional sense that it concerns whether *actual* members of the public *in fact* understand reasons. This would make for an in principle operationalisable criterion of accessibility (albeit one requiring potentially extensive empirical research). But this way of specifying the criterion would go against the tendency in most public reason theory, which has moved away from *actual* endorsement towards either counterfactual endorsement (under the relevant circumstances, an agent *would* accept the law) or *rationally required* endorsement (under the relevant circumstances, agents *should* accept the law) (Vallier and D’Agostino 2014, sect. 2.1).

Why does Laborde nevertheless opt for a reading of the accessibility condition as relative to what actual citizens find accessible? Instead of discussing this issue, however, Laborde focuses on whether public reason should be a merely epistemic or a more demanding substantive requirement. Epistemic requirements concerns the conditions for knowing whether a claim holds, whereas substantive conditions concern the content of the claim. Liberalism as an epistemic position says, e.g., that the reasons for laws should be accessible to citizens. Liberalism as a substantive position says that laws should, e.g., respect individual liberty and treat people as equals. Laborde agrees with the latter, but argues that the substantive conditions are separate from the public reason requirement, which is purely epistemic.

The epistemic/substantive distinction is not, however, the same as the distinction between whether or not epistemic requirements should be understood relative to actual citizens. Even

if one accepts Laborde's distinction between public reason as purely epistemic and substantive liberal requirements on the content of laws, there is still the issue whether epistemic accessibility is a function of the *kind* of reasons or of *the agent's* competence and background knowledge. Although she qualifies her view slightly in a footnote (p. 114, fn. 293), Laborde's answer suggests an *agent-relative* rather than a *reason-relative* perspective: accessibility is matter of what actual citizens can understand rather than of the *kind* and *source* of the reasons. But the two distinctions cut across each other:

| | Agent-relative | Reason-relative |
|-------------|--|--|
| Epistemic | The reasons for laws should be accessible to actual citizens (Laborde's view) | The reasons for laws should be of certain types, e.g. derive from certain types of sources. |
| Substantive | Legitimacy depends on whether specific people agree with the reason, irrespective of what the reason is (not necessarily a liberal view) | The liberal permissibility of laws can be entirely derived from the liberal pedigree of the reasons that are brought to justify them (Laborde's reading of Quong's view, p. 116) |

If one opts for hypothetical or rationally required endorsement, this tends towards a reason-relative perspective: if reasons of certain types are available for a law, then sufficiently informed citizens *would* or *should* endorse the law, not the other way round. If Laborde is right that public reason is distinct from substantive liberal values, then hypothetical endorsement might be grounded on epistemic features of reasons rather than on a requirement that they have a liberal content. But then one could side with Laborde on the epistemic/substantive issue and still disagree with her agent-relative reading of accessibility. Moreover, by doing so one would arguably be in respectable company, since this amounts to going for hypothetical rather than actual endorsement.

Additional argument is required to justify Laborde's agent-relative position. This justification has to answer the question why it is not sufficient to provide agents with *actually accessible* reasons whether or not they happen to *understand* (or agree with) them? If we take the agent-relative reading seriously, then the wrong of not respecting people as democratic reasoners threatens to expand to attach to a much broader range of policies as soon as they are based on any claim that any actual citizens might find hard to understand (e.g. fiscal policies based on advanced economic models or environmental laws based on climate science). Do we really want to exclude such policies as liberally illegitimate?

So in order for Laborde's theory to actually provide the promised kind of solution, it needs to be specified with respect to a specific criterion of accessibility. Moreover, once we start to do this, it runs in to difficult questions about applicability that revive classic issues about

actual versus hypothetical consent and where Laborde has yet to provide a full defence of her preferred position.

The inclusiveness condition

I now move from the epistemic to the substantive part of Laborde's minimal secularism. While accessibility of reasons is necessary for liberal legitimacy, it is not sufficient. The first additional condition is that a liberal state also has to treat people as equals. Laborde discusses this requirement with respect to cases of symbolic establishment, i.e. cases where the state officially endorses some religion but still respects the equal rights (to religious liberty and non-discrimination) of citizens who are not adherents of the established religion. Since states might do this for non-religious reasons, e.g. for reasons of social cohesion, such cases need not breach epistemic requirements of public reason and do not infringe on individual liberty. So what is wrong with symbolic establishment?

Symbolic religious establishment is wrong when it communicates that religious identity is a component of civic identity – of what it means to be a citizen of that state -, and thereby deny civic status to those who do not endorse that identity, who are then treated as second-class citizens. (p. 129)

Again, Laborde's main message is that it is not religion – here in the form of establishment – that matters; what matters is the liberal value of civic equality. Establishment is wrong if it makes religion a part of civic identity, but not if it does not do this.

In a way quite similar to how she presented her accessibility condition as an 'empirical theory of public reason', Laborde stresses that 'the criterion of civic inclusiveness is singularly context-dependent' (p. 132). This makes it a contingent question whether establishment is wrong, which has to be assessed on a case-by-case basis.

I agree with Laborde here. But just as in the case of the accessibility condition, the inclusiveness condition raises a similar follow up question: if we are not concerned with religion *as such*, but with civic equality, how do we then determine whether a given instance of establishment is acceptable or not? Laborde is most concerned with showing that she does not single religion out as special. But in doing so she does not say much about the criterion of civic inclusiveness that is supposed to replace it. Her concluding passage is characteristic of this:

In sum, the wrongness of state-endorsed religious symbols should be assessed in relation to the following criteria. First, it is not religion-dependent: it does not hinge on the semantic meaning of religion but, rather, relies on an interpretation of its social meaning as one possible suspect category for purposes of social discrimination and domination. Second, it is not person-dependent: it does not hinge on individuals' perceptions of exclusion or domination; nor does it hinge on whether individuals positively associate with the group or identity that is excluded from state endorsement. Third, it is context-dependent: social meanings vary from society to society. Fourth, it is

symbol-dependent: different symbols can have different social meanings in different locations. (p. 134)

As a statement supposed to sum up what makes state endorsement of religion wrong, this passage is plainly inadequate – the two first ‘criteria’ are almost purely negative in that they only say what the criterion of civic inclusiveness *is not*. The third and fourth ‘criteria’ – although formulated in more positive terms – boil down to the negative message that there is no general answer across contexts about when establishment is wrong. The only positive specification is that we should assess each case in terms of whether establishment violates civic equality. But how do we do this? In order to make these case-by-case assessments, we need – again – a *criterion* of civic inclusiveness, which *defines and picks out* the relevant kind of equality in particular cases. Laborde elsewhere suggest that civic inclusion has to do with non-domination and is a sort of social equality, but this still falls short of an applicable criterion.

So while Laborde succeeds in sketching the contours of a theory that does not pick out religion as special, she does not say much about the specific content of the criterion of civic equality that is supposed to do the job in this theory. Therefore, it cannot yet provide solutions to political controversies over establishment.

Meta-jurisdictional sovereignty

The standard figure of thought in debates about secularism is the idea of *separation*. Secularism is about separation of church and state and of politics and religion more generally. Laborde’s book nuances and qualifies this idea – there is not one kind of separation, but many, they concern different aspects of religion, not religion *as such*, and these aspects are instances of several more general normative liberal concerns. These points nevertheless still leave us with a (nuanced and qualified) version of the idea of separation.

This means that there still will be cases where politics and religion, church and state, have to be separated. In real life politics, this figure has led to the further idea that, in such cases, churches and the state are somehow equal authorities with sovereignty within their respective spheres of competence. This is the idea of *church autonomy*, which has found expression in a number of ways – from the classical standoff between the Catholic Church and European princes, to recent court cases where private businesses have claimed – and won – exemptions from anti-discrimination law and mandatory health insurance based on the freedom of religion of their owners.

Even if one accepts Laborde’s disaggregation approach, one could still claim church autonomy and hold that states have no authority over religious associations, communities and businesses. On such a view, freedom of religion is not a right granted by the state but an expression of state sovereignty giving way to religious sovereignty – analogous to the territorial border between states where one jurisdiction stops and another begins.

In Chapter 5, Laborde identifies and discusses this issue as what she helpfully labels ‘the Jurisdictional Boundary problem’. This is first of all a problem in the sense that there is an

issue here that needs to be addressed – the boundary has to be drawn for any idea of separation or neutrality to work. However, it is furthermore a problem for the traditional articulation of liberalism in terms of neutrality, because this decision is not itself a neutral one.

It is a major contribution of Laborde's book to acknowledge this issue as one liberalism has to address. The traditional claim that liberalism is about neutrality has blinded liberals to exactly this issue and exposed them to warranted criticism. Furthermore, the same idea has in fact provided support for claims about church autonomy assumed by the noted kind of court decisions. The idea of liberalism as neutrality has thereby provided support for recent attacks on liberal anti-discrimination to health insurance laws.

In light of this, Laborde's even more important contribution is that she clearly bites the bullet and asserts that liberal egalitarians cannot avoid granting the state the 'meta-jurisdictional authority' to delimitate the proper boundaries of religion: Liberal democratic legitimacy presupposes the final authority of the state in solving the Jurisdictional Boundary question (p. 155). Liberalism cannot only be a theory of justice and separation; it also has to be a theory about the sovereign state:

One of its rightful prerogatives is what constitutional theorists call *Kompetenz-Kompetenz*: it has the competence to decide the respective areas of competence of associations within it. To use my preferred terminology, the state has the competence to adjudicate Jurisdictional Boundary questions. (p. 156)

This theory of state sovereignty of course has to be a *liberal* theory, so meta-jurisdictional authority is a function of liberal legitimacy:

once a state enjoys liberal legitimacy, it has, in addition, the prerogative to fix the more determinate boundary between what counts as religion and what counts as non-religion, in more specific controversies about which there is reasonable disagreement about justice. (p. 157, fn. 387)

This idea has two elements. One is that the category of religion is not a natural category but is in fact constructed and constituted by the state. The state decides what counts as religion. Before the state installed this difference, religion was not distinct from other spheres. Therefore, it makes no sense when proponents of church autonomy appeal to a separate and pre-existing religious sovereignty, which is on a par with state sovereignty, because religion is a product of the state.

Another element, however, is that the state only has the prerogative to make this determination if it already enjoys legitimacy. The fixing of the boundary between state and church, between religion and non-religion, is only normatively justified if the state is legitimate in the first place. Acts of meta-jurisdictional boundary drawing only have normative (as opposed to practical legal) authority if the state lives up to whatever conditions there are for legitimacy. Assessments of meta-jurisdictional authority require assessments of legitimacy. We therefore need a full theory of liberal legitimacy in order to be able to determine whether a state in fact has the authority to decide any given boundary question.

Laborde cannot be expected to provide a detailed theory of state legitimacy – her book already covers an extensive topic with several big sub-debates. The general formulation of meta-jurisdictional authority as a function of state legitimacy nevertheless raises one question, which falls squarely within the issue of liberalism and religion. It seems to assume that legitimacy can be ascertained *before* and *independently of* how the state draws the boundaries between religion and non-religion. The state's authority to make the latter kind of decisions depends on its legitimacy, which depends on other qualities (whether it pursues a recognisably liberal conception of justice, and does so democratically, cf. p. 162).

But could it not be the case that *whether* the state has liberal legitimacy itself, at least partly, depends on *how* it settles the boundary question? If this is the case, then meta-jurisdictional authority is not a simple function of legitimacy, because there would be a feedback loop from how the state actually decides jurisdictional boundary questions to whether it is in fact legitimate. If so, it would not be possible – contrary to what the quote above might suggest – to determine whether a state is legitimate and therefore has meta-jurisdictional authority *before* and *independently of* how the state draws the boundaries between religion and non-religion.

One might present this possibility as a substantive criticism of Laborde's view: that the relation between legitimacy and boundary drawing is the *reverse* of what she suggests. Libertarians might think that state legitimacy is purely a matter of whether the state respects pre-existing rights and that some of these rights are about non-interference in religion. This would then support church autonomy and the 'New Religious Institutionalism' rather than provide an argument against it.

Chapter 5 of Laborde's book opposes exactly this kind of view. But even if one agrees that libertarianism in general and church autonomy in particular are implausible views, and that liberally legitimate states have meta-jurisdictional sovereignty, *how* the state settles boundary questions still seems relevant to *whether* the state is liberally legitimate. Laborde provides her answer to this question by way of her substantive theory of the justice of exemptions from general laws based on what she calls coherence and competence associational interests.

While I agree with her response to proponents of church autonomy in the first section of chapter 5 and find her substantive view of freedom of association in the second section plausible, I will end by noting a possible worry about the general *form* of her view. If meta-jurisdictional authority is a function of state legitimacy but state legitimacy in turn partly depends on how the state decides boundary questions, this might lead to a kind of general *regress problem* akin to the democratic boundary problem, i.e. that legitimacy depends on boundary-setting, which in turn depends on legitimacy.

The problem arises if there can be *reasonable* disagreement about both a) whether a state is liberally *legitimate*, and b) how the *boundary* problem should be settled. Laborde acknowledges the former (p. 165) as well as the latter (p. 163) to be live issues. In such cases, it seems that we cannot say, as Laborde does, that disagreement about boundary drawing is not about jurisdiction but merely about whether a specific decision is just –

because the question about whether the state has the requisite meta-jurisdictional authority itself depends on how it settles the boundary question.

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